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Claims that an arbitral tribunal failed to deal with an issue: the setting aside of awards under the Arbitration Act 1996 and the UNCITRAL Model Law on International Commercial Arbitration

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ABSTRACT

After an award has been rendered, one of the parties may seek to challenge it on the basis that the tribunal failed to address an important question which was raised in the arbitration. The Arbitration Act 1996 ('AA96') provides for the setting aside (or remission) of an award if the tribunal failed to deal with an issue that was put to it (s 68(2)(d)). Although there is no equivalent provision in article 34 of the UNCITRAL Model Law ('Model Law'), there are cases decided in several Model Law jurisdictions which show that the courts of these countries are no less willing than the English courts to set aside (or remit) an award if the tribunal failed to deal with an important issue. In policy terms, such cases – which fall perilously close to the dividing line between the merits, on the one hand, and the arbitral procedure, on the other – raise questions over the extent to which supervisory courts should allow themselves to be drawn into second-guessing the merits of the parties' dispute. At a more technical level, there are two issues which merit close examination: first, which paragraph of article 34 of the Model Law (if any) provides the legal basis for the court's power to set aside in cases of arbitral omission; secondly, if article 34 does authorise setting aside in these cases, to what extent does the process of reasoning of the courts of Model Law jurisdictions run in parallel with that of the English courts under the AA96. Ultimately, is it possible to say that, in this area, the AA96 provides a preferable solution to that of the Model Law (or *vice versa*)?

I Introduction

Back in the 1980s, the Departmental Advisory Committee on Arbitration Law recommended against England adopting the UNCITRAL Model Law on International Commercial Arbitration ('Model Law'). Although the Arbitration Act 1996 ('AA96') was drafted with close regard to

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the Model Law, whose impact can clearly be seen in terms of the AA96's structure, style and content, the decision was taken that English arbitration law should retain a number of distinctive features; even in those areas in which the objectives of the AA96 broadly mirror those of the Model Law, there are places where the two legislative schemes diverge.

One significant area of difference involves the setting aside of awards. On this question, the Model Law is, at first glance, simplicity itself. The six grounds for setting aside under article 34 are 'essentially the same reasons as those on which recognition or enforcement may be refused under ... article V of the 1958 New York Convention on which [article 34] is closely modelled.'² The AA96, however, approaches setting aside in a different way. There are five significant points of contrast.

First, in keeping with the traditions of English arbitration law, section 69 of the AA96 provides that, albeit in carefully circumscribed and narrow circumstances, an award may be set aside if, as regards the merits of the dispute, the arbitral tribunal made an error of English law. The Model Law, by contrast, follows the modern international practice of making no provision for setting aside because the tribunal did not reach the correct result, on either the facts or the law.

Secondly, the AA96 separates 'jurisdictional' defects from 'procedural' and other defects: the former fall within section 67; the latter are covered by section 68. Under the Model Law, by contrast, there is no systematic division: jurisdictional defects are addressed by article 34.2.a.i (invalid arbitration agreement) and article 34.2.a.iii (excess of jurisdiction); procedural problems are covered by article 34.2.a.ii (due process) and article 34.2.a.iv (incorrect arbitral procedure);³ public policy (including non-arbitrability) falls within article 34.2.b.

² UNCITRAL, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* (1985) ('*UNCITRAL Analytical Commentary*') Article 34, para 6 (available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V85/244/18/PDF/V8524418.pdf?OpenElement>). For obvious, logical reasons, art 34 of the Model Law contains no provision corresponding to art V.1.e NYC, according to which an award may be refused recognition or enforcement if it has been set aside by the courts of the country in which, or under the law of which, that award was made.

³ The scope of art 34.2.a.iv also extends to cases where the composition of the arbitral tribunal was not in accordance with the applicable rules – a defect which may be classified as jurisdictional, rather than purely procedural.

Thirdly, section 68(2) lists a total of twelve procedural grounds ('serious irregularities') on which an award may be set aside or remitted. This list contrasts, as has just been seen, with the Model Law's two procedural grounds. Of course, there is considerable overlap between elements of sections 68(2) and of article 34 of the Model Law; for example, section 68(2)(c) ('failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties') mirrors part of article 34.2.a.iv and section 68(2)(a) ('failure by the tribunal to comply with section 33 (general duty of tribunal [to act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent]))' broadly matches article 34.2.a.ii which allows for an award to be set aside if the applicant was 'unable to present his case'. However, section 68(2) is more detailed than article 34 and the English legislation contains grounds for setting aside which have no direct counterpart in the Model Law, such as section 68(2)(f) ('uncertainty or ambiguity as to the effect of the award') and section 68(2)(h) ('failure to comply with the requirements as to the form of the award').

Fourthly, it is expressly provided that an award cannot be set aside on one of the grounds in section 68(2) unless the irregularity relied on by the applicant has caused or will cause 'substantial injustice' to the applicant. In purely textual terms there is no counterpart to this aspect of section 68 in article 34.⁴

Fifthly, section 68(3) provides that, if a serious irregularity is established, the supervisory court has a choice between three options: remitting the award to the tribunal for reconsideration, setting aside the award or declaring the award to be of no effect. By contrast, article 34 provides simply that an award 'may' be set aside if one of the grounds is established, thereby giving the supervisory court a degree of flexibility without stipulating how that flexibility should operate.

The combined effect of these differences is to produce setting-aside regimes which, although largely seeking to implement the same policies, are structured in rather different

⁴ See, however, Section IV[d], below.

ways. This point can be illustrated by the relatively common situation where, after an award has been rendered, one of the parties (typically, a respondent whose defence was wholly or partially unsuccessful) challenges the award on the basis that the tribunal failed to consider an important question which was raised in the arbitration.

The AA96 includes a specific ground for setting aside which addresses this type of case; section 68(2)(d) provides for an award to be set aside or remitted if the tribunal 'failed to deal with all the issues that were put to it'. This is another of the grounds in section 68(2) which has no direct counterpart in the Model Law. If one assumes that, in policy terms, the courts of Model Law jurisdictions are no less concerned than the English courts about the potential injustice flowing from an arbitral tribunal's failure to deal with an issue presented in the arbitration, the following question arises: how are the types of case which fall within section 68(2)(d) AA96 to be dealt with under article 34 of the Model Law? This question can be answered at two different levels. First, if the courts of Model Law jurisdictions are willing to set aside or remit awards in cases where the tribunal failed to deal with all the issues, what is the relevant legal basis under article 34? Secondly, to what extent do the decisions of the courts of Model Law jurisdictions mirror those of the English courts in terms of their process of reasoning and to what extent, if at all, are the English authorities influential in such cases?

The analysis which follows seeks to answer these two questions (Sections III and IV). However, the discussion starts by examining the nature of arbitral omissions and where, within a typology of omissions, a failure 'to deal with an issue' can be located (Section II). Finally, the discussion finishes with a conclusion which seeks to draw together the threads of the preceding sections (Section V).

II Arbitral omissions

When a party to an arbitration seeks to challenge an arbitral award on the ground that it failed to address a claim or an issue or an argument or a piece of evidence, the law could, in broad terms, adopt one of three positions along a spectrum. First, at one end of the spectrum, one might say that, having rendered its award, the tribunal has effectively dealt with all the claims, issues, arguments and evidence. In a case in which the claimant

advances two distinct claims, if the tribunal awards damages for the first claim, but does not refer to the other one, it might be thought that the tribunal implicitly rejected the second claim. Similarly, according to this approach, an award which decides that the respondent was in breach of contract must (logically) have rejected all of the respondent's defences even if none of the defences is explicitly considered by the award. The same analysis could be applied to all the arguments, submissions and evidence presented to the tribunal; the award refers to those matters which the tribunal considered to be most relevant and anything omitted from the award was either rejected or deemed unimportant. According to this approach, there is no such thing as an arbitral omission.

This approach does have attractions and there are some cases in which one of the parties has sought (unsuccessfully) to press an argument along these lines.⁵ If arbitration is to be seen as an autonomous method of dispute resolution outside the courts, it is for the tribunal to decide what is relevant or irrelevant and how to present its findings and conclusions in the award. However, the argument that the notion of an arbitral omission is an illusion cannot be supported. If an arbitral award fails to address either expressly or impliedly an important matter presented during in the arbitration, it is a not unreasonable inference that the tribunal might have overlooked it or, at any rate, failed to accord it sufficient significance.

If an award is challenged on the basis of such an omission, the response might be that the tribunal did, in fact, deal with the issue, but failed to state its reasons for doing so. But, whether the alleged omission is characterised as an omission of substance (failure to deal with an issue) or a defect in terms of reasoning or communication (failure to provide reasons for the decision), the disappointed party has a legitimate complaint. Unless they have dispensed with the requirement for reasons, the parties to the arbitration are entitled to be told why the tribunal accepted or rejected their respective cases. From the parties' point of view, it makes little difference whether the tribunal overlooked a particular matter or whether it decided the matter in question, but failed to communicate its decision and/or

⁵ See, eg, *Symbion Power LLC v Venco Imtiaz Construction Co* [2017] EWHC 348 (TCC) at [55].

the reasons for it. As the judge said in *Buyuk Camlica Shipping Trading & Industry Co Inc v Progress Bulk Carriers Ltd*:

It is not sufficient for an arbitral tribunal to deal with crucial issues *in pectore*, such that the parties are left to guess at whether a crucial issue has been dealt with or has been overlooked.⁶

Institutional arbitration rules and national arbitration legislation accept that, if *claims* are submitted to arbitration, an award which fails to deal with all those claims is defective; an award which fails to deal with one (or more) of the claims presented to the tribunal, whether formally by way of pleadings or otherwise,⁷ is referred to as *infra petita*. Whether or not an award is *infra petita* depends on its proper interpretation: the fact that an award does not expressly address a particular claim does not necessarily mean that the tribunal failed to deal with it; it may, for example, be appropriate to conclude from the award as a whole that the tribunal impliedly rejected the claim in question.⁸ But, it follows logically from recognition of the concept of an *infra petita* award that it is not legitimate simply to decide that any claim advanced in the arbitration that is not addressed in the award was necessarily rejected by the tribunal.

Where the tribunal fails to decide a claim or counterclaim submitted to arbitration the party disadvantaged by that omission should, in principle, apply to the arbitrator again.⁹ If a claim has been omitted from the award, arbitration rules¹⁰ and legislation¹¹ provide that, in response to an application by one of the parties, the tribunal may render an additional

⁶ [2010] EWHC 442 (Comm) at [38].

⁷ As regards the presentation of claims, no particular formality is required. In the words of Hamblen J in *Cadogan Maritime Inc v Turner Shipping Inc* [2013] EWHC 138 (Comm) at [22]: ‘it does not matter how the claim has been placed before the tribunal. It does not, for example, have to be a claim set out in written pleadings or submissions.’ While claims are generally advanced by the parties, a claim may be presented by operation of statute: *Casata Ltd v General Distributors Ltd* [2006] NZSC 6 (in which, in the context of an arbitration seated in New Zealand, an arbitral tribunal was entitled to render an additional award in relation to costs, by virtue of cl 6 of the Second Schedule to the Arbitration Act 1996 (NZ), even though no party had claimed costs).

⁸ Born, *International Commercial Arbitration* (2nd edn, 2014) p 3149.

⁹ Savage & Gaillard (eds), *Fouchard, Gaillard & Goldman on International Commercial Arbitration* (1999) para 1628.

¹⁰ See, eg, art 48 CIETAC Arbitration Rules; art 39 HKIAC Administered Arbitration Rules; art 27 LCIA Arbitration Rules; art 29 SIAC Arbitration Rules; art 39 UNCITRAL Arbitration Rules.

¹¹ AA96, s 57(3)b); art 33.3 of the Model Law.

award.¹² The value of such provisions is that they ‘enable[...] the arbitral process to correct itself, rather than requiring applications to the Court.’¹³ The power of an arbitral tribunal to render an additional award is limited to cases where the award rendered by the tribunal omits ‘any claim’¹⁴ or ‘claims’;¹⁵ it does not extend to situations where the alleged omission was a failure to deal with something less than a claim, such as an issue or an argument.¹⁶

Building on the idea that an arbitral tribunal’s failure to deal with a claim is a defect which requires a remedy, the law could adopt a position at the opposite end of the spectrum from the first: an award might be treated as defective if it fails to deal with any claim, issue, argument or evidence presented by the parties. According to this approach, an aggrieved party would be able to challenge an award in any case in which the tribunal failed to deal systematically with the totality of the case advanced by each party to the arbitration.

While such an approach might appeal to a disappointed party who feels that it lost in the arbitration because the award failed to give due weight to its arguments, submissions and evidence, it would involve an unacceptable level of judicial interference with the arbitral process. If, for example, an award could be set aside or remitted in the situation where the arbitral tribunal failed to consider the submissions or evidence of one of the parties, the supervisory court would inevitably be drawn into second-guessing the tribunal’s decisions on questions of law and fact, thereby completely undermining the tribunal’s independence. Accordingly, it is universally acknowledged that arbitrators are ‘not required to address every factual or legal allegation submitted by the parties, let alone every argument put forward’;¹⁷ no modern system of arbitration law goes so far as accepting that *any* arbitral omission – in terms of claims, issues, submissions, arguments or evidence – may justify the court’s intervention.

¹² Under s 57(3)(b) AA96, the tribunal may also act ‘on its own initiative’. See *Union Marine Classification v Government of the Union of Comoros* [2015] EWHC 508 (Comm); permission to appeal was refused: [2016] EWCA Civ 239.

¹³ DAC, *Report on the Arbitration Bill* (1996) para 261.

¹⁴ AA96, s 57.

¹⁵ Art 33.3 of the Model Law.

¹⁶ See Phang JA in *BLC v BLB* [2014] SGCA 40 at [108], rejecting the view of the judge at first instance on this point: *BLB v BLC* [2013] SGHC 196.

¹⁷ Savage & Gaillard (eds), *Fouchard, Gaillard & Goldman on International Commercial Arbitration* (1999) para 1630.

The third approach falls between the other two. It recognises that, both in terms of theory and practice, an arbitral tribunal may fail to deal with all the matters that were submitted to it, an irregularity for which the aggrieved party may be entitled to a remedy. At the same time, however, it seeks to uphold, as far as possible, the autonomy of the arbitral process. Within this third approach, a dividing line has to be drawn between matters which the award must address – and which, if not addressed, may lead to setting aside or remission of the award – and other matters. In the context of the AA96, the location of this dividing line depends on how the courts interpret the word ‘issues’ in the phrase ‘failure by the tribunal to deal with all the issues that were put to it’. If the tribunal fails to deal with an ‘issue’, the award may be set aside or remitted; if, however, the tribunal fails to deal with matters that fall short of being ‘issues’, section 68(2)(d) is not engaged.¹⁸

III Failure by the tribunal to deal with all the issues: legal bases

As noted in the introduction, whereas section 68(2)(d) AA96 expressly provides that an award may be set aside or remitted if the tribunal failed ‘to deal with all the issues that were put to it’, there is no equivalent provision in the Model Law. This does not mean, of course, that disappointed parties do not seek to overturn awards rendered in Model Law jurisdictions on procedural grounds in cases where the tribunal allegedly failed to deal with all the issues. The question, though, is this: how, if at all, do the sorts of challenge which fall within section 68(2)(d) AA96 fit within article 34 of the Model Law? The cases decided in Model Law jurisdictions such as Singapore, Hong Kong, Australia and Canada suggest five possible solutions: the fact that an award fails to deal with an issue is a not a ground for setting aside under the Model Law [a]; an award which fails to deal with an issue may be set aside or remitted under article 34.2.a.iii (excess of jurisdiction) [b], or under article 34.2.a.ii (due process) [c], or under article 34.2.b.ii (public policy) [d], or under article 34.2.a.iv (incorrect procedure) [e]. As will be seen, none of these solutions is completely without its problems.

¹⁸ The dividing line between issues, on the one hand, and other matters, on the other, is considered further in Section IV[a], below.

It should be noted that there is some overlap between the various provisions of article 34. In particular, inability to present one's case (article 34.2.a.ii) is one aspect of natural justice which, in most legal systems, is regarded as forming part of public policy (article 34.2.b.ii). As will be seen below, other overlaps are also possible. Accordingly, when an application for setting aside is based on the contention that the arbitral procedure was defective, there are circumstances in which the applicant may seek to rely on more than one provision of article 34.¹⁹ Having said that, the fundamental role of article 34 is to protect the procedural rights of the parties to the arbitration by providing a remedy in cases where the arbitration was not conducted fairly. As the overriding concern is fairness,²⁰ the classification of an alleged irregularity is a secondary issue: '[w]hatever label is placed on the procedural error, and whichever subsection of article 34(2) is invoked, the essential question remains the same.'²¹ The requirements that the applicant must satisfy – as opposed to the legal basis on which an application for setting aside or remission may be founded – are considered in Section IV.

[a] No basis for setting aside infra petita awards under the Model Law

The arbitral tribunal is exclusively competent to determine the merits of the dispute referred to arbitration. In the context of the Model Law, the authorities are unambiguous. For example, in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK*,²² a decision of the Singapore Court of Appeal, VK Rajah JA stated the relevant principle in the following absolute terms: '[I]t is trite that mere errors of law or even fact are not sufficient to warrant setting aside an arbitral award.'²³

It might be argued that, although the Model Law makes provision for the rendering of an additional award if the tribunal fails to deal with a claim that was submitted to it,²⁴ this is the only type of arbitral omission for which the Model Law provides a remedy; as long as the

¹⁹ See Lax J in *Corporacion Transnacional de Inversiones SA de CV v STET International SpA* [1999] 45 OR (3d) 183 at [33].

²⁰ See VK Rajah JA in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] SGCA 28 at [65](a).

²¹ Doherty JA in *Popack v Lipszyc* 2016 ONCA 135 at [45].

²² [2011] SGCA 3.

²³ At [33]. Judicial statements in Model Law countries to the same (or a similar) effect are legion: see, eg, Phang JA in *BLC v BLB* [2014] SGCA 40 at [53]; Tang VP in *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd* [2011] HKCA 136 at [7]; Feldman JA in *Mexican United States v Cargill Inc* 2011 ONCA 622 at [31] and [74]; Fraiberg JSC in *Canadian Royalties Inc c Nearctic Nickel Mines Inc* 2010 QCCS 4600 at [55].

²⁴ Art 33.3.

tribunal determines all of the claims, it has completed its mandate and no recourse to the supervisory court is available to a party which asserts that the tribunal omitted to address matters that were presented to it.

In the Hong Kong case of *Brunswick Bowling & Billiards Corporation v Shanghai Zhonglu Industrial Co Ltd*²⁵ an award was challenged on the basis, *inter alia*, that the tribunal had failed to consider an issue raised by the respondent as part of its defence. This challenge was rejected by Lam J in the following terms:

Failure to consider an issue is [a] matter that goes to the substantive decision rather than a failure to follow the arbitral procedure agreed by the parties. Thus, the fact that the Tribunal failed to consider the Respondent's case properly is at most an error of law which cannot be a basis for this court to set aside the award.²⁶

In a similar vein, Canadian courts (also operating under the Model Law) have drawn attention to the differences between the setting aside regimes established by the AA96, on the one hand, and the Model Law, on the other. In *Consolidated Contractors Group SAL v Ambatovy Minerals SA*,²⁷ an Ontario judge noted that the ground for setting aside based on a failure to deal with an issue is 'not available under the Model Law'.²⁸ Also, in the Australian case of *Blanalko Pty Ltd v Lysght Building Solutions Pty Ltd*,²⁹ Croft J, having referred to the differences between the AA96 and the Model Law, stated:

the failure of an arbitrator to decide a matter falling within the submission to arbitration is, without more, not a ground on which an award will be set aside.³⁰

The counter-argument is that, if an arbitral tribunal fails to engage with the arguments presented by one of the parties in support of its case, the arbitral process falls short of the standard of fairness and due process that the parties are entitled to expect. Although there is always a danger that, in the absence of a means of appeal on the merits, a disappointed claimant or respondent will seek to invoke the setting-aside procedure even though their

²⁵ [2009] HKCFI 94.

²⁶ At [56].

²⁷ 2016 ONSC 171.

²⁸ Penny J at [50].

²⁹ [2017] VSC 97.

³⁰ At [42]. See also *O'Leary v Ryan* [2015] IEHC 820 (in which it was alleged, *inter alia*, that the tribunal had failed or refused to consider and/or take into account a point of defence pleaded by the applicant).

‘real complaint is that they consider that the tribunal reached the wrong result’,³¹ as long as the supervisory court focuses on the fairness of the procedure rather than the correctness of the decision, failure by the tribunal to deal with all the issues can legitimately be characterised as a procedural error which, in an appropriate case, may justify setting aside or remission of the award. A failure by the tribunal to deal at all with an important issue involves a grave departure from the dispute-resolution process to which the parties committed themselves and cannot simply be equated with an error of substance, the risk of which parties have to be prepared to accept.

[b] Art 34.2.a.iii (excess of jurisdiction)

Article 34.2.a.iii of the Model Law provides that an award may be set aside if it ‘deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.’

Although this provision is drafted in terms of awards that are *ultra petita* (in the sense that they go beyond the submission to arbitration), some commentators argue that it should be interpreted to cover also awards which are *infra petita*. Perhaps the leading proponent of this view is Gary Born, who suggests that ‘[t]he better view ... is that awards should generally be subject to annulment on *infra petita* grounds, including when (as in Model Law jurisdictions) arbitration legislation contains no express provision to that effect.’³² Born’s argument is that:

an arbitral tribunal’s failure to consider issues presented to it in fact amounts to an excess of authority, even if it appears only to be the reverse, because it effectively rewrites the tribunal’s mandate, which is an act beyond the arbitrators’ competence; that is particularly true when a tribunal fails to consider defenses or counterclaims related to relief that it does grant.³³

This view has been influential in Singapore, for example. In *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK*,³⁴ the Singapore Court of Appeal accepted that article 34.2.a.iii is engaged not only in situations where an arbitral tribunal improperly decides matters that were not submitted to it but also in those where the tribunal fails to decide

³¹ Flaux J in *Primera Maritime (Hellas) Ltd v Jiangsu Eastern Heavy Industry Co Ltd* [2013] EWHC 3066 (Comm) at [6].

³² *International Commercial Arbitration* (2nd edn, 2014) p 3294.

³³ *Ibid.* See also Paulsson, *The 1958 New York Convention in Action* (2016) p 188.

³⁴ [2011] SGCA 33.

matters that had been submitted to it.³⁵ This interpretation is, however, controversial – it flies in the face of the wording of the provision in question – and there seems to be no reported case in which an *infra petita* award has ultimately been set aside or remitted on the basis of article 34.2.a.iii.³⁶ While opinion on whether an award which fails to resolve all of the issues raised in an arbitration may be set aside under article 34.2.a.iii remains divided, the text of article 34.2.a.iii is more consistent with the view that it deals solely with the problem of awards which are *ultra petita*.³⁷

[c] Art 34.2.a.ii (due process)

Article 34.2.a.ii of the Model Law enables the supervisory court to set aside an award if the applicant ‘was unable to present his case.’ Most of the cases concerning this provision have involved the question whether the tribunal’s conduct of the arbitration had the effect of restricting the applicant’s room for manoeuvre in some way (for example, by giving the parties limited notice of hearings on certain issues or by deciding a dispute on a basis not raised or contemplated by the parties or by limiting the length of hearings during which parties could develop their arguments). It has been suggested, however, that there are two dimensions to the ability to present a case: a party’s opportunity to ‘speak’ and the tribunal’s obligation to ‘listen’. As Penny J said in *Consolidated Contractors Group SAL v Abatovy Minerals SA*,³⁸ a Canadian case:

A party might be said to have been ‘unable’ to present his or her case when ... the tribunal ignored or failed to take the evidence or submissions of the parties into account.³⁹

Nevertheless, the situation where the tribunal fails to decide matters that were put to it does not obviously fall within the wording of article 34.2.a.ii. Although there are instances in

³⁵ See VK Rajah JA at [31]. See also *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] SGHC 186; *BLB v BLC* [2013] SGHC 196.

³⁶ The first instance decision in *BLB v BLC* [2013] SGHC 196 (discussed by Tan & Ahmad, ‘The UNCITRAL Model Law and Awards *infra petita*’ (2014) 31 J Int Arb 413) was reversed on appeal in *BLC v BLB* [2014] SGCA 40.

³⁷ This view is also supported by authorities relating to art V.1.c, the equivalent provision of the NYC: van den Berg, *The New York Arbitration Convention of 1958* (1981) p 318; Port, Bowers *et al*, ‘Article V(1)(c)’ in Kronke, Nacimiento *et al* (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (2010) p 277.

³⁸ 2016 ONSC 7171.

³⁹ At [57].

which an arbitral omission has been held to engage article 34.2.a.ii,⁴⁰ such cases may be regarded as unorthodox. A more orthodox interpretation of the phrase ‘unable to present his case’ was adopted in *Depo Traffic v Vikeda*,⁴¹ which involved an application to enforce a Chinese award in Ontario.⁴² The award debtor (‘V’) had argued that, because it had been unable to present part of its defence, the award should not be enforced. According to V, the tribunal had ‘failed to render legal or factual findings on a submission fundamental to its defence’⁴³ and had ‘failed to consider, in a meaningful and substantive way, the defence put forward by [V]’;⁴⁴ this failure, so the argument went, amounted to denying V the ability to present its case. The Ontario judge was not persuaded. According to Chiappetta J, if V’s argument were accepted, the court would have to treat article 34.2.a.ii/ 36.1.a.ii as including words ‘that are simply not there’.⁴⁵

[d] Art 34.2.b.ii (public policy)

Article 34.2.b.ii of the Model Law allows for the setting aside of an award if it conflicts with the public policy of the forum. There is international consensus that, for the purposes of the New York Convention (‘NYC’) and the Model Law, public policy is a narrow concept which is engaged only if an award is ‘contrary to the fundamental conceptions of morality and justice’ of the forum⁴⁶ or if upholding the arbitral award ‘would “shock the conscience” ... or [would be] “clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public”’.⁴⁷ In a legislative framework which makes no provision for appeals on the merits and contains limited grounds on which an award may be set aside, it is almost inevitable that there will be pressure for the courts to expand the scope of public policy to accommodate cases in which it appears that the

⁴⁰ Under German law, for example, it is not sufficient that the arbitral tribunal merely heard the arguments presented by the parties and took note of the evidence offered by them; it must also take them into account in the arbitral award: *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (‘*UNCITRAL Digest*’) p 150, para 74 (available at: <http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf>).

⁴¹ [2015] ONSC 999.

⁴² Although the case concerned art 36.1.a.ii, the question of interpretation was, in substance, identical to that under art 34.2.a.ii.

⁴³ At [36].

⁴⁴ At [38].

⁴⁵ At [39].

⁴⁶ *Parsons and Whittemore Overseas Co Inc v Société Générale de Industrie du Papier (Rakta)* (1974) 508 F 2d 969 at 974.

⁴⁷ Chan Sek Keong CJ in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41 at [59] (citations omitted).

arbitration has gone wrong in some fundamental way, but the complaint does not obviously fall within any of the other grounds for setting aside.

It is widely assumed that the principles of natural justice are part of public policy; the twin pillars of natural justice – *audi alteram partem* (the ‘hearing’ rule) and *nemo iudex in causa sua* (the ‘bias’ rule) – may legitimately be regarded as fundamental in a public policy sense.⁴⁸ But, is the ‘hearing’ rule breached if an arbitral tribunal fails to decide an issue that was put to it? As already seen in the discussion of article 34.2.a.ii, it has been argued that the ‘hearing’ rule includes a sub-rule that the tribunal must ‘listen’ to the parties. This line of argument has been accepted, in principle, by courts in Australia.⁴⁹ Similarly, in the seminal case of *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd*,⁵⁰ the Singapore High Court decided that there may be a breach of natural justice if the tribunal fails to consider material arguments or submissions of one of the parties. This view was based on the idea that a party’s right to be heard also includes the rule that an arbitral tribunal cannot disregard submissions or arguments without considering them on their merits.⁵¹

There is also similar authority from Hong Kong. In *A v B*⁵² an application to set aside an award was based on the allegation that the award had failed to deal with the applicant’s ‘limitation defence’ – that the claims advanced in the arbitration were time-barred under the express provisions of the agreement that gave rise to the dispute between the parties. Mimmie Chan J acknowledged that, ‘[a]t first blush, it may appear that [the applicant] can

⁴⁸ In Singapore law, there is a separate rule which provides for an award to be set aside if ‘a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced’: International Arbitration Act, s 24(b). There is a similar rule in the Australian International Arbitration Act 1974, which implements the NYC: an award may be refused enforcement if ‘to enforce the award would be contrary to public policy’ (s 8(7)) and ‘the enforcement of a foreign award would be contrary to public policy if ... a breach of the rules of natural justice occurred in connection with the making of the award’ (s 8(7A)(b)).

⁴⁹ See, eg, *Cargill International SA v Peabody Australia Mining Ltd* [2010] NSWSC 887; *Aircraft Support Industries Pty Ltd v William Hare UAE LLC* [2015] NSWCA 229 (a case involving enforcement of an award rendered in an arbitration seated in the UAE). In neither of these cases, however, did the argument succeed on the facts.

⁵⁰ [2010] SGHC 80.

⁵¹ See Vinodh Coomaraswamy J in *AKM v AKN* [2014] SGHC 148 at [95].

⁵² [2015] HKCFI 1077.

only establish that the Arbitrator has made an error of law or on the facts.’⁵³ However, the judge stressed that it was ‘fundamental to concepts of fairness, due process and justice, as recognized in Hong Kong, that key and material issues raised for determination [by an arbitral tribunal] should be considered and dealt with fairly.’⁵⁴ Failure by the tribunal to address an essential issue was a denial of due process which engaged the public policy of Hong Kong and justified the setting aside of the award under article 34.2.b.ii.

Although Mimmie Chan J referred to the relevant authorities and purported to apply the narrow definition of public policy endorsed by such authorities,⁵⁵ whether a failure by an arbitral tribunal to deal with an issue can be regarded as ‘contrary to the fundamental conceptions of morality and justice’ of the forum might be questioned. For example, in *BLB v BLC*⁵⁶ Belinda Ang Saw Ean J doubted whether public policy could justify the setting aside of an award on the basis that the tribunal had failed to deal with all the issues put to it. In *Depo Traffic v Vikeda*,⁵⁷ V had also sought to rely on public policy as a basis for non-enforcement of the award. V had argued that the tribunal’s failure to consider, explore, or evaluate its case amounted to a denial of natural justice and that, as a result, recognition or enforcement of the award would be contrary to the public policy of Ontario. Chiapetta J rejected the argument, stressing the exceptional nature of the public policy defence.⁵⁸

The opposite position has been taken in Australia, however. In *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd*,⁵⁹ the court undertook a detailed examination of the historical relationship between natural justice and public policy (as that concept is understood under the NYC and the Model Law). The judgment of the court concluded that:

The rules of natural justice can ... be seen to fall within the conception of a fundamental principle of justice (that is within the conception of public policy), being, as they are, equated with, and based on, the notion of *fairness*. ...Fairness

⁵³ At [29].

⁵⁴ At [33].

⁵⁵ See, eg, the authorities cited in nn 46 and 47.

⁵⁶ [2013] SGHC 196 at [100].

⁵⁷ [2015] ONSC 999.

⁵⁸ It should be noted, however, that V’s argument failed at the first hurdle: the judge considered that the tribunal had been alive to V’s submissions and that it had referred to the issue (which V claimed had been overlooked) in its award.

⁵⁹ [2014] FCAFC 83.

incorporates the underlying requirement of equality of treatment of the parties. ...The conceptions of fairness and equality ... lie at the heart of the constitutional conception of due process. They are inhering elements of law and justice that inform and bind any legal system and any legal order.⁶⁰

The court emphasised that, when deciding whether the rules of natural justice have been breached, the court's task is not to embark upon the 'formal application of rules disembodied from context, or taken from another statutory or human context'; an award which results from a process that (allegedly) breached the rules of natural justice is not contrary to public policy 'unless fundamental norms of justice and fairness are breached.'⁶¹ When the principles of natural justice are seen in this light, any objection to their characterisation as an element of public policy for the purposes of article 34.2.b.ii/36.1.b.ii seems misplaced.

[e] Art 34.2.a.iv (incorrect procedure)

In the context of international commercial arbitration, arbitrators are, as a general rule, required to provide reasons for their decision. If the parties agree to *ad hoc* arbitration (with its seat in a Model Law country), the applicable procedural rule is provided by article 31.2 of the Model Law, according to which '[t]he award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given ...'. If the parties have agreed to institutional arbitration, the institutional rules will usually include the same rule.⁶² Although the tribunal does not have to provide reasons for accepting or rejecting every argument or piece of evidence presented in the arbitration,⁶³ if the award does not address the important legal and factual issues raised by the parties, the tribunal has not complied with its obligation to provide reasons for its decision. Assuming that the obligation to give reasons was not excluded by the parties, a tribunal which fails to give adequate reasons for its decision commits a procedural irregularity. In such circumstances, may the award be challenged under article 34.2.a.iv of the Model Law – which provides that an award may be

⁶⁰ At [73].

⁶¹ At [111].

⁶² See art 43.2 CIETAC Arbitration Rules; 31.2 ICC Arbitration Rules; art 34.4 HKIAC Administered Arbitration Rules; art 26.2 LCIA Arbitration Rules; art 5.2.e SIAC Arbitration Rules. See also art 34.3 UNCITRAL Arbitration Rules.

⁶³ *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] SGHC 186 at [72]. See also *Prometheus Marine Pte Ltd v King* [2017] SGHC 36.

set aside if ‘the arbitral procedure was not in accordance with the agreement of the parties ... or, failing such agreement, was not in accordance with this Law’?

The answer to this question depends, in part, on what is meant by ‘arbitral procedure’. In terms of the Model Law, there is a clear distinction between ‘Conduct of Arbitral Proceedings’ (Chapter V) and ‘Making of Award and Termination of Proceedings’ (Chapter VI), which includes (in article 31.2) the tribunal’s obligation to provide reasons for its decision. If the ‘arbitral procedure’ involves only those matters covered by Chapter V (and not matters within Chapter VI), failure by the tribunal to provide reasons cannot be a ground for setting aside on the basis of article 34.2.a.iv.

Be that as it may, it seems generally to be assumed by commentators that an award which does not include (adequate) reasons may be set aside either on the basis of public policy⁶⁴ or under article 34.2.a.iv⁶⁵ and there are cases under the Model Law which proceed on the basis that article 34.2.a.iv is engaged if an award, in terms of reasoning, falls short of the requirements of article 31.2.⁶⁶ As already seen, in *A v B*⁶⁷ the applicant challenged an award for having failed either to deal with the applicant’s ‘limitation defence’ or to offer any reasons for this omission. Having analysed the award and the way in which the arbitration had been argued, the judge concluded that, in terms of the reasons, the award was defective. Mimmie Chan J rightly pointed out that ‘[a]n award should be reasoned, to the extent of being reasonably sufficient and understandable by the parties’⁶⁸ and considered that the reasons expressed in the award were not sufficient to enable the applicant to understand how, and why, the limitation defence had been rejected. Although the award was set aside on public policy grounds, the judge seems to have accepted that, as an alternative, the award might have been set aside under article 34.2.a.iv.

If the court accepts that failure by the tribunal to deal with all the issues that were presented to it is a procedural defect which may justify setting aside on the basis of one (or

⁶⁴ Waincymer, *Procedure and Evidence in International Arbitration* (2012) para 16.9.1.

⁶⁵ Born, *International Commercial Arbitration* (2nd edn, 2014) p 3274.

⁶⁶ See, eg, *Hoban v Coughlan* [2017] IEHC 301.

⁶⁷ [2015] HKCFI 1077.

⁶⁸ At [33].

more) of the provisions of article 34, the following question remains: what exactly does the applicant have to establish in order for the application to succeed? It is to this question that the discussion now turns.

IV The requirements for a successful application under section 68(2)(d) AA96 and under article 34 of the Model Law

When a setting-aside application is based on the tribunal's failure to decide an issue presented in the arbitration, the AA96 establishes a framework of five significant questions which the court needs to answer: the first is whether the matter with which the tribunal (allegedly) failed to deal was an 'issue' [a]; if so, was that issue 'put to' the tribunal? [b]; if so, did the tribunal fail to deal with it? [c]; if so, did (or will) the applicant suffer substantial injustice as a result? [d]; if so, is the appropriate remedy setting aside or remission? [e].⁶⁹

The fact that section 68(2)(d) requires the court to address a series of specific questions results from the detailed drafting of the AA96's setting-aside provisions. In Model Law jurisdictions, however, the courts are confronted by more general and abstract questions – such as whether the applicant was able to present his case, whether there had been a breach of the rules of natural justice or whether the award is contrary to the public policy of the forum – rather than a detailed legislative schema. Nevertheless, if an award may be set aside on the basis that the tribunal failed to deal with all the issues, the supervisory court has to decide what exactly, in the particular context, natural justice or public policy requires. As will be seen, there are parts of the English framework which are bound to be replicated in the context of applications under article 34 of the Model Law: for example, the requirements that the (allegedly) omitted issue had been put to the tribunal and that the tribunal had failed to deal with it (ie, questions [b] and [c] of the English framework) are, logically, a necessary part of *any* regime that allows for annulment on the basis of the tribunal's failure to deal with all the issues.

⁶⁹ An application for setting aside based on s 68(2)(d) may fall at any of these hurdles: the decided cases suggest that the success rate of applications under s 68(2)(d) is very low (certainly, less than 10%; probably less than 5%). In other jurisdictions, the success rate of setting aside applications on the basis that an award is *ultra/infra petita* is also very low. The statistical data from Switzerland suggest a success rate of around 3%: Dasser & Wójtowicz, 'Challenges of Swiss Arbitral Awards – Updated and Extended Statistical Data as of 2015' (2016) 34 ASA Bulletin 280, 286.

This section examines how the questions that arise under section 68(2)(d) are addressed by the English courts and also considers the extent to which the same questions are regarded as relevant in the context of setting-aside applications under the Model Law and the extent to which, if at all, the courts of Model Law jurisdictions have been influenced by or have drawn on English authorities. At a general level, there is some evidence that the position under English law has had an impact on the thinking of judges in Model Law jurisdictions. For example, in *A v B*⁷⁰ the judge's conclusion that failure by the tribunal to deal with the applicant's limitation defence involved a breach of natural justice and, as a result, infringed Hong Kong's public policy was, partly, justified by the fact that such a failure provides a basis for setting aside under the AA96. Mimmie Chan J, having been referred to cases such as *Ascot Commodities NV v Olam International Ltd*,⁷¹ *Van der Giessen-de Noord Shipbuilding Division BV v Imtech Marine and Offshore BV*⁷² and *Soeximex SAS v Agrocorp International Pte Ltd*,⁷³ 'agree[d] with the sentiments expressed by the court [in those cases] that it is a serious irregularity and a denial of due process ... if an important issue, which the parties are entitled to expect to be addressed, is not in fact addressed.'⁷⁴ Notwithstanding the differences between the legislative frameworks in England and Hong Kong, it is not unreasonable to expect that an arbitral defect which falls within section 68(2)(d) may also provide a reason for setting aside under one of the more general provisions of article 34.

[a] What is an 'issue' for the purposes of section 68(2)(d)?

One English judge has described trying to define what is an 'issue' as an 'impossible task';⁷⁵ another has suggested, somewhat unhelpfully, that whether a matter is an issue 'should normally be obvious'.⁷⁶ In terms of the structure of the AA96, failure to deal with an 'issue' (to which section 68(2)(d) refers) is to be distinguished from failure to deal with a 'claim' (section 57(3)(b)). In *Torch Offshore LLC v Cable Shipping Inc*,⁷⁷ Cooke J described an issue as 'part of a claim' and considered that a claim is 'a head of claim for damages or some other remedy', whereas 'an issue ... is part of the process by which a decision is arrived at on one

⁷⁰ [2015] HKCFI 1077

⁷¹ [2002] CLC 277.

⁷² [2008] EWHC 2904 (Comm).

⁷³ [2011] EWHC 2743 (Comm).

⁷⁴ [2015] HKCFI 1077 at [33].

⁷⁵ Andrew Smith J in *Petrochemical Industries Co v Dow Chemical* [2012] EWHC 2739 (Comm) at [17].

⁷⁶ Morison J in *Fidelity Management SA v Myriad International Holdings BV* [2012] EWHC 1193 (Comm) at [9].

⁷⁷ [2004] EWHC 787 (Comm).

of th[e] claims'.⁷⁸ Within this typology, the determination of a single 'claim' will require the tribunal to resolve a range of 'issues', which make up C's claim and R's defence.

The courts have sought to distinguish 'issues', on the one hand, from 'arguments' advanced or 'points' made or 'lines of reasoning' or 'steps' in an argument,⁷⁹ on the other, while also recognising that '[i]t can be difficult to decide quite where the line demarking issues from arguments falls.'⁸⁰ There are several decisions which refer to 'issues' as being important, fundamental, essential, crucial or key.⁸¹ However, these adjectives are best not understood as a gloss on the language of section 68(2)(d).⁸² Whether a matter is an 'issue' primarily turns on whether determination of the matter in question was necessary for a decision on the claims or defences presented to the tribunal.⁸³

Where, for example, a respondent defends a claim for breach of contract on two independent bases, it may be that the arguments for one of the defences are very weak and those for the other defence are much more persuasive. Nevertheless, both defences are, in principle, 'issues', regardless of the strength or weakness of the arguments involved.⁸⁴ If the tribunal rejects the claimant's claim on the basis of one of the defences, failure by the tribunal to decide on the other defence does not engage section 68(2)(d): nothing turns on whether the second defence is accepted or rejected and failure by the tribunal to deal with the second defence cannot cause or have caused substantial injustice to either party.

⁷⁸ At [27].

⁷⁹ See *Petrochemical Industries Co v Dow Chemical* [2012] EWHC 2739 (Comm) at [16]; *Husmann (Europe) Ltd v Al Ameen Development & Trade Co* [2000] CLC 1243, 1260-1.

⁸⁰ Andrew Smith J in *Petrochemical Industries Co v Dow Chemical* [2012] EWHC 2739 (Comm) at [21]; Akenhead J in *Secretary of State for the Home Department v Raytheon Systems Ltd* [2014] EWHC 4375 (TCC) at [33]. See also Judge Kealey QC in *Buyuk Camlica Shipping Trading & Industry Co Inc v Progress Bulk Carriers Ltd* [2010] EWHC 442 (Comm) at [44] (there is a 'fine line sometimes between an issue, on the one hand, and a line of reasoning, on the other').

⁸¹ See, eg, *Fidelity Management SA v Myriad International Holdings BV* [2012] EWHC 1193 (Comm) at [10]; *Abuja International Hotels Ltd v Meridien sas* [2012] EWHC 87 (Comm) at [51]; *Ascot Commodities NV v Olam International Ltd* [2002] CLC 277, 284; *PT Transportasi Gas Indonesia v ConocoPhillips (Grissik) Ltd* [2016] EWHC 2834 (Comm) at [58].

⁸² *Petrochemical Industries Co (KSC) v Dow Chemical Co* [2012] EWHC 2739 (Comm) at [16].

⁸³ *Weldon Plan Ltd v Commission for the New Towns* [2001] 1 All ER 264 at [21]; *World Trade Corporation v C Czarnikow Sugar Ltd* [2004] EWHC 2332 (Comm) at [16]; *Abuja International Hotels Ltd v Meridien sas* [2012] EWHC 87 (Comm) at [51].

⁸⁴ Judge Kealey QC in *Buyuk Camlica Inc v Progress Bulk Carriers Ltd* [2010] EWHC442 (Comm) at [38].

An 'issue' – such as whether a contract was frustrated – may include sub-questions or sub-issues – such as whether contractual performance had been rendered illegal or whether the (allegedly) frustrating event was foreseeable or had been self-induced – which are also themselves 'issues' within section 68(2)(d).⁸⁵ This point is illustrated by *Soeximex SAS v Agrocorp International Pte Ltd*,⁸⁶ which involved disputes arising out of a contract for the sale of a cargo of Burmese rice. A question arose as to whether the buyers' failure to open a letter of credit was a breach of the contract; the buyers' defence was that opening the letter of credit would have infringed US and/or EU regulations banning trade with Burma and would, therefore, have been illegal. The buyers argued the illegality point on two alternative bases: (i) payment was to be made to Burmese recipients; (ii) in any event, the US regulations prohibited the export of financial services to Burma (regardless of the nationality of the recipients of any funds). The buyers also offered a completely separate argument under the EU regulations. The tribunal decided that illegality had not been established because it was not satisfied that the recipients under the letter of credit would be Burmese. The award made no mention of the alternative arguments under the US and EU regulations – neither of which involved establishing that the recipients of the funds would be Burmese. In terms of section 68(2)(d), the situation might have been analysed in one of two ways. First, the 'issue' was illegality and the three arguments which the buyers raised were just that – arguments or lines of reasoning. According to this analysis, section 68(2)(d) would not be engaged. Secondly, even though the question of illegality was clearly an 'issue' under section 68(2)(d), the three arguments raised by the buyers were also to be regarded as 'issues' (or 'sub-issues'). According to this analysis, although the tribunal dealt with the Burmese recipients defence (in the claimant's favour), it had not addressed the other two defences and, therefore, had failed to deal with all the issues that were put to it. Gloster J adopted the second analysis: each limb of the buyers' defence was a separate 'issue';⁸⁷ the fact that the tribunal failed to address two of the buyers' three contentions was a serious irregularity within section 68(2)(d).

⁸⁵ Andrew Smith J in *Petrochemical Industries Co (KSC) v Dow Chemical Co* [2012] EWHC 2739 (Comm) at [16].

⁸⁶ [2011] EWHC 2743 (Comm).

⁸⁷ See also *Transition Feeds LLP v Itochu Europe plc* [2013] EWHC 3629 (Comm).

In terms of fundamental principle, the setting-aside procedure does not provide the supervisory court with an opportunity to re-visit the factual determinations of the arbitral tribunal. As Flaux J pointed out in *Sonatrach v Statoil Natural Gas LLC*, ‘the evaluation of the evidence is entirely a matter for the tribunal.’⁸⁸ Whether the tribunal accorded to any particular evidence more weight or less weight or no weight at all is not an ‘issue’ within the meaning of section 68(2)(d); how the tribunal evaluates the evidence is merely part of the process whereby an issue is resolved.⁸⁹

In *Ispat Industries Ltd v Western Bulk Pte Ltd*,⁹⁰ ship-owners (‘C’) claimed damages from charterers (‘R’) for breach of a time charter. One of the disputed questions was whether C had acted reasonably in mitigating its loss. The majority of the arbitrators decided that there had been no unreasonable failure to mitigate and awarded damages equal to the hire payable for the estimated duration of the charterparty. Although one of the arbitrators (‘D’) dissented because he considered that the evidence of W, one of the witnesses on the question of mitigation, was unreliable, the majority had accepted W’s evidence. The award had neither addressed D’s concerns over the reliability of W’s evidence nor explained why W’s testimony was considered reliable. R sought to challenge the award under section 68(2)(d) on the basis that the award had failed to deal with an ‘issue’ that had been put to it – namely, W’s reliability. The judge dismissed this challenge on the ground that any question surrounding W’s reliability, a question concerning the tribunal’s evaluation of the evidence, was not an ‘issue’ for the purposes of section 68(2)(d).

It is also clear that ‘fail[ure] to take into account evidence or a document said to be relevant to [an] issue is not properly to be regarded as a failure to deal with an issue.’⁹¹ Time and time again the English courts have re-iterated that ‘it is not permissible on a section 68 application to seek to argue that the arbitrator has not dealt with a particular piece of evidence.’⁹²

⁸⁸ [2014] EWHC 875 (Comm) at [12]. See also *Claire & Co Ltd v Thames Water Utilities Ltd* [2005] EWHC 1022 (TCC).

⁸⁹ See Colman J in *World Trade Corp Ltd v C Czarnikow Sugar Ltd* [2004] EWHC 2332 (Comm) at [31].

⁹⁰ [2011] EWHC 93 (Comm).

⁹¹ Colman J in *World Trade Corporation v C Czarnikow Sugar Ltd* [2004] EWHC 2332 (Comm) at [45].

⁹² Akenhead J in *The Celtic Explorer* [2015] EWHC 1810 (Comm) at [41]. See also *Schwebel v Schwebel* [2010] EWHC 3280 (TCC). Disappointed parties have attempted to rely on s 68(2)(a) AA96 to have awards set aside on

By the same token, under English law, failure by the tribunal to provide reasons for its decision does not amount to failure by the tribunal to deal with all the issues for the purposes of section 68(2)(d). In *Hussman (Europe) Ltd v Al Ameen Development & Trade Co* Thomas J said:

a tribunal [is not required] to set out each step by which they reach their conclusion or deal with each point made by a party in an arbitration. Any failure by the arbitrators in that respect is not a failure to deal with an issue that was put to it. It may amount to a criticism of the reasoning, but it is no more than that.⁹³

In the same vein, Morison J confirmed in *Fidelity Management SA v Myriad International Holdings BV* that ‘there is a difference between a failure to deal with an issue ... and a failure to provide any or any sufficient reasons for the decision.’⁹⁴

As has been seen in Section III, applications of the type which fall within section 68(2)(d) AA96 are most likely, under the Model Law, to be viewed through the prism of due process, natural justice or public policy. The legislative scheme of the Model Law, unlike section 68(2)(d), does not require the supervisory court to determine the nature of the omission alleged by the applicant.

Nevertheless, the English case law has had an influence on the analysis of the courts of Model Law jurisdictions. This influence is, perhaps, most clearly seen in *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd*,⁹⁵ a decision of the Singapore High

the basis that, by overlooking significant evidence, the tribunal failed in its obligation to treat the parties equally; in *Arduina Holdings BV v Celtic Resources Holdings plc* [2006] EWHC 3155 (Comm) Toulson J (at [46]) accepted (*obiter*) that an arbitrator’s failure to take any or proper consideration of the evidence could, in an exceptional case, give rise to a challenge under s 68(2)(a). However, there appears to be no reported case in which an award has been set aside or remitted on this basis and the correctness of Toulson J’s *dictum* may be questioned.

⁹³ [2000] CLC 1243, 1261.

⁹⁴ [2012] EWHC 1193 (Comm) at [10]; see also *Margulead Ltd v Exide Technologies* [2004] EWHC 1019 (Comm) at [46]. The fact that failure to provide adequate reasons does not engage s 68(2)(d) does not mean that such failures are legally irrelevant: (i) under s 57(3)(a) AA96, a party may apply to the tribunal to ‘remove any ambiguity in the award’, which may require the provision of further reasons or clarification of the reasoning (see *Torch Offshore LLC v Cable Shipping Inc* [2004] EWHC 787 (Comm)); (ii) in the context of a setting-aside application, the court may order the tribunal to state the reasons for its award in sufficient detail so that the court is able to consider the application (s 70(4) AA96); (iii) an award may be set aside for ‘failure to comply with the requirements as to the form of the award’ (s 68(2)(h) AA96); ‘requirements as to form’ include reasons for the tribunal’s decision.

⁹⁵ [2013] SGHC 186.

Court. The application to set aside the award was based on two grounds: first, the applicant argued that the tribunal had breached the rules of natural justice; secondly, relying on article 34.2.a.iii of the Model Law, the applicant argued that the tribunal had exceeded its authority. Under the head of natural justice, the applicant argued, *inter alia*, that the arbitrator had disregarded and ignored the applicant's submissions and/or had not fully explained the reasons for his conclusions and/or had not applied his mind fully to the issues before him.

When dealing with these assertions, Chan Seng Onn J asked himself whether natural justice requires an arbitral tribunal to address all the arguments canvassed and evidence presented and to explain why it accepted or rejected each argument. Having considered cases such as *Ascot Commodities NV v Olam International Ltd*⁹⁶ and *Hussman (Europe) Ltd v Al Ameen Development and Trade Co*,⁹⁷ the judge decided that '[a]n arbitral tribunal is not obliged to deal with every argument' and 'need not deal with each *point* made by a party in an arbitration'; rather, echoing the position adopted by the English courts under section 68(2)(d), the judge considered that the tribunal needs only 'to ensure that the *essential issues* are dealt with.'⁹⁸ If the principles of natural justice cannot be breached unless a tribunal 'fail[s] to consider an important issue that has been pleaded in an arbitration',⁹⁹ the outer limits of the scope of the court's setting-aside jurisdiction in Model Law jurisdictions are essentially the same as those of the English courts under section 68(2)(d) AA96.

[b] Was the issue 'put to' the tribunal?

Cases arise in which it is alleged that the tribunal failed to deal with an issue which, after the event, the applicant wishes it had raised in the arbitration. If the issue in question had not been submitted to the tribunal, the tribunal cannot legitimately be criticised for not having dealt with it and section 68(2)(d) AA96 is not engaged.¹⁰⁰ It is the tribunal's role to address the cases that the parties advanced, not the cases that they might (or should) have

⁹⁶ [2002] CLC 277.

⁹⁷ [2000] CLC 1243.

⁹⁸ At [73]. As for the distinction between an 'argument' and an 'issue', see Chan Seng Onn J's judgment at [75]-[76]. See also *Consolidated Contractors Group SAL v Ambatovy Minerals SA* 2016 ONSC 171 at [124] ('Reviewing courts have stated repeatedly that the arbitral tribunal is not required to mention every argument.').

⁹⁹ Sundaresh Menon CJ in *AKN v ALC* [2015] SGCA 18 at [46].

¹⁰⁰ See, eg, *A v B* [2017] EWHC 596 (Comm).

advanced. It has been emphasised (in the context of the Model Law) that the setting aside process 'is not to be abused by a party who, with the benefit of hindsight, wished he had pleaded or presented his case in a different way before the arbitrator.'¹⁰¹

In the recent English case of *A v B*,¹⁰² for example, the applicant argued that, in the context of a dispute relating to the alleged breach of a contract for the sale of goods, the tribunal had failed to decide what were the express and implied terms of the contract and, in particular, whether, by virtue of section 14(2B)(a) of the Sale of Goods Act 1979, the goods supplied should have been regarded as of unsatisfactory quality because they were unfit for all the purposes for which goods of the kind in question are commonly supplied.

Judge Butcher QC rejected the argument: first, the potential impact of section 14(2B)(a) was an *argument*, rather than a fundamental issue;¹⁰³ second, even if the point relating to section 14(2B)(a) had been an 'issue', it had not been 'put to' the tribunal. The judge noted that there had been 'minor and incidental arguments' relating to section 14(2B)(a), but that the applicant had not attempted to present any evidence which would have backed up reliance on that section. An issue is not 'put to' the tribunal for the purposes of section 68(2)(d) simply because it is mentioned (in passing) at some point of the arbitration: it is not 'a serious irregularity for a tribunal to fail to deal with a point which was put before them, if at all, only unclearly and indistinctly.'¹⁰⁴ Accordingly, in *A v B*, the fact that the award did not address section 14(2B)(a) was not an omission which could found a claim under section 68(2)(d) AA96.

Not surprisingly, the cases decided under the Model Law are equally insistent that, if it is alleged that the tribunal breached natural justice by failing to deal with an issue, that issue must have been presented to the tribunal for decision. As Phang JA observed in *BLC v BLB*:

It is important not to underestimate the ingenuity of counsel who seek to launch backdoor appeals or, worse still, completely reinvent their client's cases with the benefit of hindsight in the guise of a challenge based on an alleged breach of natural

¹⁰¹ Phang JA in *BLC v BLB* [2014] SGCA 40 at [53].

¹⁰² [2017] EWHC 596 (Comm).

¹⁰³ At [37].

¹⁰⁴ Judge Butcher QC in *A v B* [2017] EWHC 596 (Comm) at [39].

justice. ... The courts must be wary of a party who accuses an arbitrator of failing to consider and deal with an issue that was never before him in the first place.¹⁰⁵

When deciding whether a particular issue was presented in the arbitration, the court will ask whether the tribunal failed to respond to a 'clearly articulated argument'.¹⁰⁶ As the tribunal does not have 'to deal with mere assertions which are unsupported by argument',¹⁰⁷ if an argument was not clearly articulated, the tribunal's not having considered it cannot be a breach of the rules of natural justice.¹⁰⁸ In this respect, the case law under the Model Law adopts the same approach as the English authorities – without actually referring to or explicitly relying on them.

[c] Was the issue dealt with by the tribunal?

By far and away the most common reason for the rejection of applications based on section 68(2)(d) is that the tribunal did deal with the issue which the applicant alleges was omitted from the award. It is well established that the supervisory court should not read the challenged award with an overcritical eye; nit-picking is the wrong approach; an arbitral award should not be read like a statute, but should be approached in a reasonable and commercial way; the judge should not analyse an award with a meticulous legal eye, endeavouring to pick holes, inconsistencies and faults in it; the court's expectation should be that it will not, normally, be possible to find substantial fault with an award that is subject to challenge.¹⁰⁹ In the context of applications under section 68(2)(d), when an award is approached in the appropriate way, it is normally clear that the tribunal did decide the allegedly omitted issue – albeit not in the way that the applicant had hoped.¹¹⁰

¹⁰⁵ [2014] SGCA 40 at [4]. See also *Cargill International SA v Peabody Australia Mining Ltd* [2010] NSWSC 887 in which the judge accepted (at [31]) that there was 'some force in the suggestion ... that what is now sought to be put by [the applicant] [was] a modification or reformulation of the ... submission that was in fact put before the Arbitrator.'

¹⁰⁶ Bathurst CJ in *Aircraft Support Industries Pty Ltd v William Hare UAE LLC* [2015] NSWCA 229 at [46].

¹⁰⁷ *Ibid.*

¹⁰⁸ *Cargill International SA v Peabody Australia Mining Ltd* [2010] NSWSC 887.

¹⁰⁹ Authorities in England include *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14; *Pace Shipping v Churchgate Nigeria Ltd* [2009] EWHC 1975 (Comm); *Atkins Ltd v Secretary of State for Transport* [2013] EWHC 139 (TCC); *Crystal Palace v Pulis* [2016] EWHC 2999 (Comm).

¹¹⁰ See, eg, *UMS Holding Ltd v Great Station Properties SA* [2017] EWHC 2398 (Comm).

Section 68(2)(d) is not applicable unless the tribunal did not deal with an issue *at all*;¹¹¹ it does not matter for the purposes of section 68(2)(d) whether the tribunal dealt with it well, badly or indifferently.¹¹² In *The Celtic Explorer*,¹¹³ for example, the applicant sought to challenge an award on the basis that the award, by addressing a point raised by the applicant only briefly, had not dealt with the issue. As the judge explained, the applicant's 'real complaint' was that the arbitrator's reasoning on the point in question was not 'fuller and better expressed'.¹¹⁴ The judge considered that it was likely that the arbitrator had dealt with the point shortly because it did not merit more discussion; the point had been advanced by the applicant's counsel with no evidence from his own expert to support it and the point had been contradicted by the claimant's expert, whose evidence the arbitrator had preferred anyway. In such circumstances, it was 'scarcely surprising that the arbitrator had given it pretty short shrift.'¹¹⁵

A tribunal which decides all the issues that were essential in order for it to come to its decision on the claims and defences raised in the arbitration has dealt with all the issues for the purposes of section 68(2)(d).¹¹⁶ The fact that the tribunal may have failed to deal with a non-essential matter is not relevant.¹¹⁷ Not every essential issue needs to be explicitly decided: by expressly dealing with some issues, the tribunal may also impliedly deal with others.¹¹⁸ Moreover, some of the issues raised by the parties may not require decision by the tribunal: by deciding some issues in a certain way, the tribunal may render other issues irrelevant.¹¹⁹ For example, a tribunal that rejects a claim because the respondent has no liability does not fall foul of section 68(2)(d) if it does not come to a conclusion on each issue

¹¹¹ Judge Lloyd QC in *Weldon Plant Ltd v The Commission for the New Towns* [2001] 1 All ER 264 at [31].

¹¹² Akenhead J in *Secretary of State for the Home Department v Raytheon Systems Ltd* [2014] EWHC 4375 (TCC) at [33].

¹¹³ [2013] EWHC 3066 (Comm).

¹¹⁴ At [39].

¹¹⁵ Ibid.

¹¹⁶ *Buyuk Camlica Shipping Trading & Industry Co Inc v Progress Bulk Carriers Ltd* [2010] EWHC 442 (Comm) at [30].

¹¹⁷ *Latvian Shipping Co v Russian People's Insurance Co (ROSNO) Open Ended Joint Stock Co* [2012] EWHC 1412 (Comm).

¹¹⁸ See, eg, *Symbion Power LLC v Venco Imtiaz Construction Co* [2017] EWHC 348 (TCC).

¹¹⁹ See *Primera Maritime (Hellas) Ltd v Jiangsu Eastern Heavy Industry Co Ltd* [2013] EWHC 3066 at [10]. See also *Secretary of State for the Home Department v Raytheon Systems Ltd* [2014] EWHC 4375 (TCC).

(or any issue) about quantum: by its decision on liability, the tribunal disposes of (or ‘deals with’) the quantum issues.¹²⁰

The approach of the English courts is also reflected in the case law decided under the Model Law. There are four points that are particularly worthy of note.

First, following English cases such as *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd*¹²¹ and *Atkins Ltd v Secretary of State for Transport*,¹²² the Singapore courts have also decided that, in the context of a setting-aside application, the supervisory court should read the award in a reasonable and commercial way, avoiding nit-picking and an excessively semantic analysis of the text of the award.¹²³

Secondly, an applicant can succeed on the basis that the tribunal’s failure to deal with an issue involved a breach of the principles of natural justice only by establishing a clear and virtually inescapable inference – which will be drawn only in exceptional circumstances – that the arbitrator did not apply his mind *at all* to a particular aspect of the applicant’s submissions;¹²⁴ such an inference will not be drawn if the award is consistent with the arbitrator simply having misunderstood the applicant’s case or having been mistaken as to the law or having chosen not to deal with a point because he (mistakenly) thought it unnecessary to do so.¹²⁵ In this regard, it is important to keep in mind the distinction between a tribunal’s decision to *reject* an argument (whether implicitly or otherwise, whether rightly or wrongly), on the one hand, and a tribunal’s failure even to *consider* that argument, on the other.¹²⁶ Only the latter can possibly amount to a breach of the principles of natural justice.

¹²⁰ *Petrochemical Industries Co v Dow Chemical* [2012] EWHC 2739 (Comm) at [27].

¹²¹ [1985] 2 EGLR 14.

¹²² [2013] EWHC 139 (TCC).

¹²³ *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] SGCA 28; *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] SGHC 186; *BLC v BLB* [2014] SGCA 40; *AKN v ALC* [2015] SGCA 18; *ASG v ASH* [2016] SGHC 130.

¹²⁴ Vinodh Coomaraswamy J in *ASG v ASH* [2016] SGHC 130 at [62].

¹²⁵ Sundaresh Menon CJ in *AKN v ALC* [2015] SGCA 18 at [46]. See also *Prometheus Marine Pte Ltd v King* [2017] SGHC 36.

¹²⁶ Sundaresh Menon CJ in *AKN v ALC* [2015] SGCA 18 at [47].

The Singapore courts have held that it is not a breach of natural justice for a tribunal to decline to express a view on an issue which its chain of reasoning renders irrelevant.¹²⁷ The approach adopted under the Model Law – which echoes that of the English cases decided under section 68(2)(d)¹²⁸ – means that an applicant will rarely be able to satisfy the court that the tribunal breached natural justice by failing to deal with an issue. More often than not, in cases where it is alleged that, by not applying its mind to, or engaging with, the applicant’s actual case, the tribunal committed a breach of natural justice, no such breach occurred.¹²⁹ Normally, the supervisory court ends up rejecting the challenge on the basis that, on the facts, the tribunal did deal – whether expressly or by implication¹³⁰ – with the matter which the applicant claims to have been overlooked. But, if the tribunal mistakenly thought that the applicant had conceded a point and, as a consequence, failed to engage with an argument which might have had a bearing on the outcome of the arbitration, the tribunal has not complied with the principles of natural justice and the award may be set aside.¹³¹

Thirdly, there are cases under the Model Law which support the view that the tribunal does not have to deal expressly with every issue. A tribunal can be said to have dealt with an issue if that issue is ‘implicitly resolved’.¹³²

Fourthly, cases under the Model Law have also decided that the tribunal does not have to address issues which, although superficially important, are rendered irrelevant or ‘of academic interest only’;¹³³ if, for example, the tribunal’s primary finding is that the claimant’s claim for breach of contract is inadmissible, the tribunal is not required to address whether or not the respondent’s conduct amounted to a breach of the terms of the contract or whether the damages claimed by the claimant were too remote.

¹²⁷ *AMZ v AXX* [2015] SGHC 283 at [123].

¹²⁸ See, eg, *Weldon Plant Ltd v The Commission for the New Towns* [2001] 1 All ER 264 at [31].

¹²⁹ See Sundaresh Memon CJ in *AKN v ALC* [2015] SGCA 18 at [39]. See, eg, *Zynergy Solar Projects & Services Pvt Ltd v Phoenix Solar Pte Ltd* [2017] SGHC 223.

¹³⁰ See *Consolidated Contractors Group SAL v Ambatovy Minerals SA* 2016 ONSC 171.

¹³¹ *AKN v ALC* [2014] SGCA 63.

¹³² *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] SGHC 186 at [77].

¹³³ Vinodh Coomaraswamy J in *ASG v ASH* [2016] SGHC 130 at [59]. See also Judith Prakash J in *AQU v AQV* [2015] SGHC 262 at [23].

[d] Did (or will) the tribunal's failure to deal with an issue cause 'substantial injustice'?

As already seen, section 68(2) requires that the serious irregularity has caused or will cause 'substantial injustice', a requirement that involves the supervisory court in examining, at least to some extent, the merits of the dispute referred to arbitration. The applicant does not have to satisfy the court that, but for the irregularity, the substantive decision would have been different; the applicant does not even have to show that it had the better of the argument on the omitted issue. The requirement of substantial injustice will be met if the supervisory court is satisfied that the omitted issue was arguable and that, had the tribunal considered it, the tribunal '*might well* have reached another conclusion favourable to the applicant'.¹³⁴ This means that a setting-aside application will necessarily fail if, even had the irregularity not occurred, the outcome of the arbitration would have been the same.¹³⁵

In *Buyuk Camlica Shipping Trading & Industry Co Inc v Progress Bulk Carriers Ltd*,¹³⁶ for example, disputes arising under charterparties had been referred to arbitration. One of the claims was for damages for breach of the description warranties in each of the charterparties. In response, the respondent argued that, if there had been a breach of the warranties, the breach had been waived by the claimant. The arbitral tribunal decided in the claimant's favour, but failed to refer to the respondent's argument on waiver. Although the question whether the claimant had waived the breach was an 'issue' which had been 'put to' the tribunal and which the tribunal had failed to 'deal with', the conditions of section 68(2) had not been satisfied. In the judge's view, it was not reasonably arguable that the claimant had waived the breach of the description warranties; as a result, the tribunal's failure to deal with the issue had not caused substantial injustice.

The opposite conclusion was reached, however, in *Van der Giessen-de-Noord Shipbuilding Division BV v Imtech Marine & Offshore BV*,¹³⁷ which involved an arbitration arising out of a contract to carry out the engineering, supply, installation and commissioning of the electrical equipment for a ro-ro ferry. With regard to one of the claims, the respondent had contended before the arbitral tribunal that the claimant had waived its right to claim certain

¹³⁴ Colman J in *Vee Networks Ltd v Econet Wireless International Ltd* [2004] EWHC 2909 (Comm) at [90].

¹³⁵ *Secretary of State for the Home Department v Raytheon Systems Ltd* [2014] EWHC 4375 (TCC) at [33].

¹³⁶ [2010] EWHC 442 (Comm).

¹³⁷ [2008] EWHC 2904 (Comm).

monies and/or was estopped from doing so. Nevertheless, the tribunal upheld the claim and did not deal with the respondent's waiver/estoppel defence. Christopher Clarke J held, *inter alia*, that this failure amounted to a serious irregularity within section 68(2)(d).

*Ascot Commodities NV v Olam International Ltd*¹³⁸ also treated the tribunal's failure to address part of the respondent's defence as a serious irregularity. The arbitration had involved a claim for damages for breach of a contract for the sale of a cargo of rice. The respondent admitted the breach and the dispute centred on the question of damages. The tribunal awarded damages on the basis that the claimant had been the beneficial owner of the cargo in question. The award made no mention of the respondent's argument that the relevant bills of lading had been pledged to the claimant, rather than transferred outright. In the context of the respondent's setting-aside application, the claimant contended that the respondent's real complaint was simply that its arguments had not been accepted by the tribunal and that, as a result, there was no irregularity for the purposes of section 68. Toulson J, however, considered that there had been a procedural defect within section 68(2)(d): this was not a case in which the tribunal had 'directed itself to, and rejected, the central issue argued by [the respondent]'; rather, the tribunal had 'missed' the 'central point'¹³⁹ (that, as the relevant bills of lading had been pledged as security, damages should not have been assessed on the basis that the claimant had been the beneficial owner of the cargo).

Although the Model Law simply provides that an award 'may be' set aside if one of the grounds set out in article 34 is satisfied and has no equivalent to the requirement of 'substantial injustice' imposed by section 68(2) AA96, the difference between the AA96 and the Model Law on this point exists more at the level of form than substance. There seems to be a broad consensus that an irregularity which does not cause prejudice to the applicant does not justify setting aside under article 34.¹⁴⁰ Within the decisions under the Model Law, there are two main categories of case. On the one hand, some decisions treat real prejudice as an essential requirement which an applicant for setting aside under article 34 needs to

¹³⁸ [2002] CLC 277.

¹³⁹ At 284.

¹⁴⁰ See Born, *International Commercial Arbitration* (2nd edn, 2014) p 3256; Lew, Mistelis & Kroll, *Comparative International Commercial Arbitration* (2003) para 25–37.

establish. This approach is illustrated by the strand in the Singapore case law which, in substance, follows the approach taken by section 68(2) AA96. In *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK*, the Court of Appeal, building on its earlier decision in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd*,¹⁴¹ ruled that an irregularity should not lead to setting aside unless it had caused ‘real or actual prejudice’.¹⁴² As for what constitutes ‘real or actual prejudice’, an approach very similar to that adopted in *Vee Networks Ltd v Econet Wireless International Ltd*¹⁴³ is followed: the test is whether the arbitral tribunal could reasonably have arrived at a different result if not for the irregularity.¹⁴⁴

On the other hand, other cases proceed on the basis that the question of prejudice is a discretionary factor to be taken into account by the court when deciding whether or not to set aside. The Hong Kong courts, for example, have rejected the notion that English law’s requirement that the alleged defect has caused or will cause substantial injustice can be imported into the Model Law,¹⁴⁵ but have accepted – perhaps most significantly in *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd*¹⁴⁶ – that, as a general rule,¹⁴⁷ if the applicant is unable to show that it had been or might have been prejudiced, the flexibility conferred by the phrase ‘may be set aside’ in article 34.2 allows the court not to set aside an award even though a ground for setting aside is established. In practice, in a case involving no prejudice, it makes little difference whether a setting-aside application fails because the supervisory court decides that no ground for setting aside is established or because,

¹⁴¹ [2007] SGCA 28.

¹⁴² [2011] SGCA 33 at [32]. See also *AKN v ALC* [2015] SGCA 18; *ASG v ASH* [2016] SGHC 130. The same approach has been adopted in other Model Law jurisdictions, such as in Australia: *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83 at [55] (‘real unfairness or real practical injustice’); *Aircraft Support Industries Pty Ltd v William Hare UAE LLC* [2015] NSWCA 229. But, compare *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2014] SGHC 220.

¹⁴³ [2004] EWHC 2909 (Comm).

¹⁴⁴ *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2012] SGCA 57 at [54].

¹⁴⁵ See, eg, *Brunswick Bowling & Billiards Corporation v Shanghai Zhonglu Industrial Co Ltd* [2009] HKCFI 94 at [35].

¹⁴⁶ [2012] HKCA 200. This case was cited and relied upon in Singapore in *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2014] SGHC 220 in which Belinda Ang Saw Ean J expressed the view (at [64]) that ‘prejudice is a factor or element relevant to, rather than a legal requirement for’ the application of art 34; ‘prejudice is merely a relevant factor that the supervising court considers in deciding whether the breach in question is serious and, thus, whether or not to exercise its discretionary power to set aside the award for the breach.’

¹⁴⁷ Exceptionally, ‘[s]ome breaches may be so egregious that an award would be set aside although the result could not be different’: Tang VP in *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd* [2012] HKCA 200 at [105].

although a ground for setting aside is established, the court exercises its discretion against setting aside: in each situation, the application is rejected for essentially the same reason – namely, that the applicant failed to show substantial injustice or prejudice.¹⁴⁸

[e] Setting aside or remission?

If the requirements of section 68(2)(d) AA96 are satisfied, setting aside is only one of the remedies available to the court; remission is an alternative to setting aside. Under the AA96, section 68(3) makes it clear that setting aside should be seen as a remedy of last resort: ‘The court shall not exercise its power to set aside ... unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.’

In practical terms, there seems little point in the court setting aside an award if it would be possible for the tribunal to make good the omission which gave rise to the setting-aside application in the first place. In this type of case, it makes more sense for the court to remit the dispute to the tribunal to allow it to address the issues which the award failed to resolve.¹⁴⁹ The authorities show that, under the AA96, in a case in which the tribunal’s award fails to deal with an issue, remission is the remedy that might normally be expected.¹⁵⁰ The language of section 68(3) (‘remit the matters in question to the tribunal for *reconsideration*’) is strongly indicative that, if the supervisory court opts for remission, the award is sent back to the original tribunal, rather than a new one. That is to say, the choice facing the court is between setting aside the award (thereby enabling the dispute to be decided afresh by a newly constituted tribunal¹⁵¹) or referring it back to the original tribunal.

Although the effect of section 68(3) AA96 is to make remission the usual remedy in cases of arbitral omission, remission is not always appropriate. The court has to consider not only all

¹⁴⁸ See the comparable position under art V NYC, discussed by Hill, ‘The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958’ (2016) 36 OJLS 304, 310.

¹⁴⁹ See, eg, *Soeximex SAS v Agrocorp International Pte Ltd* [2011] EWHC 2743 (Comm).

¹⁵⁰ *Symbion Power LLC v Venco Imtiaz Construction Co* [2017] EWHC 348 (TCC) at [76].

¹⁵¹ In this type of case, in principle, both parties could seek to re-argue points on which each party had lost in the original arbitration. However, ‘it will be a foolhardy party who, without obviously good reason, seeks to do so’ because a party which re-argues a point and loses that point again runs the risk of being penalised in terms of costs: Akenhead J in *Secretary of State for the Home Department v Raytheon Systems Ltd* [2015] EWHC 311 (TCC) at [23](c).

the circumstances and background facts relating to the dispute, the award and the arbitrators, but also the ramifications, in terms of costs, time and justice, of setting aside and remission.¹⁵² Ultimately, the court has to be satisfied that the tribunal can be trusted to (and be seen to) deliver justice for the parties if the award is remitted.¹⁵³ The more serious the irregularity, the less likely that remission will be the proper remedy. Remission is not appropriate if, for example, the parties have lost confidence in the tribunal,¹⁵⁴ or the whole arbitration will have to be re-opened and re-argued,¹⁵⁵ or the effect of the passage of time between the rendering of the award and the disposition of the setting-aside application is such that the tribunal no longer has a clear or reliable recollection of exactly how things were argued.¹⁵⁶ In such cases, a fresh start is needed and the award should be set aside.

Remission is also an alternative to setting aside under article 34.4 of the Model Law, although that provision is not drafted in the language of remit/remission. In a case in which the tribunal's failure to deal with an issue involves a breach of the rules of natural justice, remission is the remedy that might be expected under the Model Law (at least in those Model Law jurisdictions whose legal system is derived from the English legal system).¹⁵⁷ There is, however, a significant difference between section 68 AA96 and article 34.4. Whereas the English legislation gives the supervisory *court* a choice in terms of remedies, the Model Law provides that setting aside proceedings may be suspended only if the court thinks it appropriate to do so *and* the applicant makes such a request. If the applicant does not seek remission, the supervisory court's choice is between upholding the award or setting it aside.

Article 34.4, which talks about the arbitral tribunal been given 'an opportunity to resume the arbitral proceedings', indicates that, if the supervisory court opts for remission, the award is sent back to the original tribunal. In the Singapore case of *BLB v BLC*¹⁵⁸ the High Court judge had thought that, where a ground for setting aside had been established, the

¹⁵² *Secretary of State for the Home Department v Raytheon Systems Ltd* [2015] EWHC 311 (TCC) at [4].

¹⁵³ At [20].

¹⁵⁴ *Secretary of State for the Home Department v Raytheon Systems Ltd* [2015] EWHC 311 (TCC).

¹⁵⁵ *Pacol Ltd v Joint Stock Co Rossakhar* [2000] CLC 315.

¹⁵⁶ *Ascot Communities NV v Olam International Ltd* [2002] CLC 277.

¹⁵⁷ *A v B* [2015] HKCFI 1077.

¹⁵⁸ [2013] SGHC 196.

award could be remitted to a new tribunal. However, the Court of Appeal decided, albeit *obiter*, that 'the clear language of Art 34.4 does not ... permit the remission of the award (without more) to a newly constituted tribunal.'¹⁵⁹

V Conclusion

Under both the AA96 and the Model Law, an award which fails to address an essential issue which had been presented to the tribunal may be set aside or remitted. However, the different structures of the two pieces of legislation produce different judicial analyses. The analysis under the AA96 is relatively simple because section 68(2)(d) expressly identifies failure to deal with an issue as an irregularity. The absence of an equivalent provision in the Model Law leaves the courts of Model Law jurisdictions on less solid ground. As has been seen in Section III, some uncertainty exists over whether the tribunal's failure to deal with an issue is a ground for setting aside under article 34 and, if so, which statutory rule provides the legal basis for setting aside in such cases.

It is 'a basic rule of comparative law' that 'different legal systems give the same or very similar solutions, even as to detail, to the same problems of life'¹⁶⁰ – even though they may well reach these common solutions by quite different routes.¹⁶¹ As regards the question whether an arbitral award should be set aside or remitted if the tribunal failed to deal with an issue, it has been seen that the data are consistent with the 'basic rule of comparative law': in practice, the AA96 and the Model Law – though drafted differently – largely run along parallel lines.

The courts of Model Law jurisdictions, in the absence of a provision equivalent to section 68(2)(d) AA96, have been willing to entertain applications for the setting aside of awards in cases of alleged arbitral omission. Although the courts of different Model Law jurisdictions have considered different provisions of article 34 of the Model Law as the basis for such applications, the most plausible one is article 34.2.b.ii. According to this rule, an award may be set aside if it conflicts with the public policy of the forum and, as shown by the Federal

¹⁵⁹ [2014] SGCA 40 at [119]. See also *AKN v ACL* [2014] SGCA 63.

¹⁶⁰ Zweigert & Kötz, *An Introduction to Comparative Law* (3rd edn, 1998) p 39.

¹⁶¹ See Zweigert, 'Des solutions identiques par des voies différentes' (1966) 18 RIDC 17.

Court of Australia's analysis of the relationship between natural justice and public policy in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd*,¹⁶² public policy for the purposes of article 34.2.b.ii must be regarded as including the rules of natural justice.

As has been seen in Section IV, the courts of Model Law jurisdictions have adopted a similar schema to the framework of questions arising under section 68(2)(d) AA96. Both the AA96 and the Model Law require that an applicant establish not only that the award failed to address *at all* an *essential* issue which had been *clearly presented* to the tribunal but also that such failure caused *substantial injustice* (or real prejudice) to the applicant. If the applicant overcomes these hurdles the court will, as a general rule, remit the award to the tribunal, though, in exceptional cases, the award (or part of it) may be set aside. In the main, both legislative regimes arrive at very similar conclusions.

If, in terms of substance, the two regimes are broadly equivalent, any meaningful assessment of them can be made only at the level of legal technique. Not surprisingly, opinions differ on the respective strengths and weaknesses of the AA96 and the Model Law. As regards setting aside, the main strengths of the Model Law scheme are its apparent simplicity and the fact that the grounds for setting aside mirror those in article V NYC, thereby enabling cross-fertilisation of case law under the two instruments and increased opportunities for international harmonisation. However, as the foregoing discussion reveals, the apparent simplicity of the Model Law may be tested even by a relatively routine scenario. As seen, how challenges based on a tribunal's failure to deal with all the issues should be analysed under the Model Law is not entirely straightforward.

Although international uniformity in the interpretation and application of the Model Law is desirable, the discussion in Section III identifies various points at which there are divergences between the laws of Singapore, Hong Kong, Australia and Canada. Uniformity in interpretation is very hard to achieve in the context of legislative provisions whose operation depends on open-textured concepts such as due process, natural justice or public policy, the significance of which may well differ from one legal system to another. Of course,

¹⁶² [2014] FCAFC 83.

it does not follow from the foregoing comparison that the approach of the AA96 is to be preferred to that of the Model Law; indeed, section 68(2)(d) is not without its own problems. But, it needs to be recognised that legislation which appears simple on the page may prove to be less simple in practice.

Finally, it is clear that applications for the setting aside of an award because the tribunal failed to deal with an issue that was put to it present particular challenges for any modern system of arbitration law. It is indisputable that, as a general rule, the tribunal is exclusively competent to decide the merits of the parties' dispute, both in terms of law and fact. However, as noted by the courts in cases decided under both the AA96 and the Model Law, many setting aside applications are thinly-disguised attacks on the tribunals' decisions on the merits.¹⁶³ In such cases, the supervisory court has the difficult task of 'sieving out the genuine challenges from those which are effectively appeals on the merits'.¹⁶⁴

One reason why the courts' task is so tricky is that applications under section 68(2)(d) AA96 (and analogous applications under the Model Law) are located right at the cusp between the merits, on the one hand, and the arbitral procedure, on the other. An applicant, convinced of the rightness of its position and the persuasiveness of its arguments, can easily fall into the trap of thinking that the only reason that could explain the fact that it was not more successful in the arbitration is that the tribunal must have failed to consider and/or understand its case. Unless the courts are careful, an application for setting aside on the basis that the tribunal failed to deal with an issue may easily morph into a re-hearing of the substance of the dispute. This problem is graphically illustrated, in the context of the Model Law, by *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd*,¹⁶⁵ in which, at the first instance hearing, the parties spent three days arguing about, essentially, the

¹⁶³ See, eg, Langley J in *Protech Project Construction (Pty Ltd v Mohammed Abdulmohsin* [2005] EWHC 2164 (Comm) at [34] ('[the applicant's] case seeks to dress up as an irregularity what is in reality a question of law'); Teare J in *UMS Holding Ltd v Great Station Properties SA* [2017] EWHC 2398 (Comm) at [143] ('[a]s has often been said an application pursuant to section 68 should not be used to disguise what are in truth challenges to the Tribunal's findings of fact').

¹⁶⁴ Chan Seng Onn J in *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] SGHC 186 at [2].

¹⁶⁵ [2014] FCAFC 83.

tribunal's findings of fact;¹⁶⁶ the application 'was a disguised attack on the factual findings of the arbitrators dressed up as a complaint about natural justice.'¹⁶⁷ In the words of the appellate court:

Applications [for setting aside] should not be permitted to be used (or hijacked) to undertake, in substance, a rehearing of factual or legal reasoning under the guise of a complaint about a breach of the rules of natural justice.¹⁶⁸

The cases decided under the AA96 reveal similar concerns and problems. In *Weldon Plant Ltd v The Commission for New Towns*,¹⁶⁹ Judge Lloyd QC emphasised that '[s]ection 68(2)(d) is not to be used as a means of launching a detailed enquiry into the manner in which the tribunal considered the various issues.'¹⁷⁰ Notwithstanding this warning, in *London Underground Ltd v Citylink Telecommunications Ltd*,¹⁷¹ the judgment – which runs to more than sixty pages, nearly fifty of which are devoted to the section 68 application – undertakes an exhaustive discussion of the parties' pleadings, evidence and submissions and involves detailed analysis of the lengthy award. Such a process is hardly consistent with the tribunal's decision-making autonomy. Furthermore, many cases involve misconceived or inappropriate challenges. Unsurprisingly, judges sometimes find it difficult to hide their frustration at the antics and tactics of applicants, describing grounds of challenge as 'untenable',¹⁷² 'a hopeless point'¹⁷³ or 'far-fetched and insupportable'.¹⁷⁴

Even though the focus of a setting-aside application is the fairness of the arbitral process, rather than the correctness of the tribunal's decision, it is difficult to see how, in the context of an application to set aside an award on the basis that the tribunal failed to deal with an issue, the court can avoid becoming embroiled, at some level, in a re-assessment of the substance of the parties' dispute. When considering, for example, whether the issue which the tribunal allegedly failed to deal with had been put to the tribunal, the court is drawn

¹⁶⁶ See the judgment at [81]. Several of the Singapore cases also involve a very detailed and lengthy discussion of the conduct of the arbitration and award in question: see, eg, *AKM v AKN* [2014] SGHC 148 (in which the judgment runs to 130 pages).

¹⁶⁷ At [53].

¹⁶⁸ At [133].

¹⁶⁹ [2001] 1 All ER (Comm) 264.

¹⁷⁰ At [29].

¹⁷¹ [2007] EWHC 1749 (TCC).

¹⁷² *PT Transportasi Gas Indonesia v ConocoPhillips (Grissik) Ltd* [2016] EWHC 2834 (Comm) at [51], [53].

¹⁷³ *UMS Holding Ltd v Great Station Properties SA* [2017] EWHC 2398 (Comm) at [120].

¹⁷⁴ *Latvian Shipping Co v Russian People's Insurance Co (ROSNO) Open Ended Joint Stock Co* [2012] EWHC 1412 (Comm) at [41].

into an analysis of how the parties presented their respective cases. And within a framework which requires the applicant to establish that the irregularity caused substantial injustice or real or actual prejudice, the supervisory court has little choice but to consider what the decision might have been had the tribunal considered the issue in question (without actually deciding what the outcome of the arbitration should have been). A setting-aside regime that requires the supervisory court to focus on the (sometimes narrow) dividing line between the merits and the process – in a context in which the applicant has every interest in encouraging the court to stray onto the wrong side of the line – runs the risk of generating unmeritorious applications where the applicant’s arguments are ‘little more than a confected attempt to run a merits challenge of the arbitral tribunal’s legal and factual analysis’.¹⁷⁵ The autonomy of the arbitral process relies on the vigilance of the courts to prevent setting-aside applications becoming *de facto* appeals on the merits.

¹⁷⁵ Beach J in *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131 at [117].